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In The

Supreme Court of the United States

October Term, 1998

RODNEY C. HANLON, JOEL SCRAFFORD, KRIS A. McLEAN, RICHARD C. BRANZELL and ROBERT PRIESKAT,

Petitioners,

v.

PAUL W. BERGER and ERMA R. BERGER,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENTS

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BRIEF OF *AMICUS CURIAE*
NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
IN SUPPORT OF RESPONDENTS

This brief *amicus curiae* is submitted in support of Respondents Paul W. Berger and Erma R. Berger. By letters filed with the Clerk of the Court, Petitioners and

Respondents have consented to the filing of this brief.[1]

INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with a membership of more than 10,000 attorneys and 28,000 affiliate members, including representatives from all fifty states. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates.

NACDL was founded in 1958 to promote study and research in the field of criminal law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties guaranteed by the Bill of Rights and has a keen interest in ensuring that legal proceedings are handled in a proper and fair manner.

Among NACDL's stated objectives is the promotion of the proper administration of criminal justice,

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[1] As required by Rule 37.6 of this Court, *amicus curiae* submits the following: no party or party's counsel authored this brief in whole or in part; no person or entity other than *amicus curiae*, its members, or its counsel, have made a monetary contribution to the preparation or submission of this brief.

which includes preserving the integrity of the criminal justice process, ensuring the rights guaranteed persons by the Fourth Amendment to the United States Constitution, and providing fair trials to persons accused of crimes.

As a result, NACDL, consistent with its mission, files this brief *amicus curiae* in support of Respondents' claim that the Court of Appeals was correct in holding (a) that Petitioners violated clearly established proscriptions of the Fourth Amendment by allowing members of the media to join, film, and effectively participate in a search of Respondents' property pursuant to a judicially authorized warrant; and (b) as a consequence, Petitioners did not enjoy qualified immunity for their conduct.

STATEMENT

Amicus adopts Respondents' statement of the case.

SUMMARY OF ARGUMENT

This case presents an issue of fundamental importance to the integrity of the criminal justice system: whether, as Petitioners' first Question Presented asks, law enforcement officers violate the Fourth Amendment by allowing members of the news media to accompany them and to observe and record their execution of a warrant. The Ninth Circuit correctly answered that question in the affirmative, and also denied Petitioners qualified immunity as a result.

In support of Petitioners, two dozen news media companies and/or organizations (hereinafter "News Media *Amici*") have submitted a Brief *Amici Curiae*. This Brief *Amicus Curiae* by NACDL, from the perspective of practicing lawyers intimately involved in the state and federal criminal justice system, and in the protection of the constitutional rights of suspects, defendants, and all others, addresses the arguments made by the News Media *Amici*.

In fact, the News Media *Amici*, in headlong pursuit of their alleged First Amendment prerogatives to use the auspices of government law enforcement authorities to invade the privacy of individuals and violate their Fourth (and Fifth) Amendment rights, barely acknowledge the critical Fourth Amendment principles at stake.

Indeed, ironically, in positing a list of purely hypothetical remedial purposes and effects – for putative defendants, as well as for the public at large – of media participation in the execution of search warrants, and in seeking a case-by-case review of the propriety of the news media's participation, the News Media *Amici* miss the largest point of all: that the news media's *very intrusion itself* into the warrant execution process necessarily constitutes not only a violation of federal law, but also an abuse of the warrant execution process, and of the searched person's Fourth Amendment rights – an abuse so significant that it cannot be adequately ameliorated by any theoretical benefit to the public at large.

The proof is in the pudding, so to speak: the facts of this case, as well as other cases involving media participation in search warrant execution, do *not* support the News Media *Amici*'s fanciful description of a tonic effect; rather, they establish convincingly that such media participation is a prescription for constitutional violations, for chaos, for danger, and for an unwarranted, unnecessary, and potentially corrupting interference in the criminal justice process.

In addition, as detailed below, the News Media *Amici* are simply wrong in their analysis that any public "right to know" exists in this context, or that it supersedes an individual's Fourth Amendment and/or Fifth Amendment protections. In many contexts, statutes and this Court's prior decisions have established that the public is not properly privy to certain aspects of the criminal justice investigative process, and that the very integrity of that process – for both law enforcement and accused alike – depends on secrecy and confidentiality.

Accordingly, *amicus* NACDL respectfully submits that the decision of the United States Court of Appeals for the Ninth Circuit should be affirmed, and Respondents' cause of action be permitted to go forward.

ARGUMENT

I. THE COURT BELOW WAS CORRECT IN HOLDING THAT PETITIONERS VIOLATED THE FOURTH AMENDMENT BY ALLOWING MEMBERS OF THE NEWS MEDIA TO ACCOMPANY LAW ENFORCEMENT OFFICERS DURING THE EXECUTION OF A JUDICIALLY AUTHORIZED SEARCH WARRANT UPON RESPONDENTS' PERSON AND PROPERTY

A. *The News Media's Presence During Search Warrant Executions Does Not, and Will Not, Have the Effect of "Improving Public Oversight" of Law Enforcement Conduct and Activities*

In their Brief, the News Media *Amici* contend that prohibiting members of the news media from accompanying law enforcement officers during the execution of search warrants would "eliminate the only means by which the press and public can monitor abuses of that [police search] power firsthand." News Media *Amici* Brief at 8.

That is nonsense, since there is not the slightest incentive for the news media to perform that role in this context. Indeed, as the News Media *Amici* admit, "media representative are typically permitted to observe searches and seizures only at the sufferance of law enforcement

officials." *Id.*

Since the news media's continued access to search warrant executions is dependent on the good graces of the law enforcement community, no basis exists to believe that there will be any "monitoring" of those persons upon whose discretion the news media relies for future opportunities to cover such activity.

Nor, obviously, was the news media's involvement in this case designed to keep law enforcement officials "honest," or for any other such high-minded public purpose. There is not any reference in the letter agreement between Cable News Network (hereinafter "CNN") and the government to any "monitoring" purpose; nor was there any such reportage afterward, even though, for example, the agent in charge clearly lied to the Bergers in claiming that the search warrant permitted search of *all* buildings on the property (when the warrant explicitly excluded the Bergers' residence).

Indeed, the News Media *Amici*'s claim of some "monitoring" role is insupportable in light of the letter agreement, which made CNN a virtual co-venturer with the government in the search and prosecution of the Bergers. *See Berger v. Hanlon*, 129 F.3d 505, 508 (9th Cir. 1997), *cert. granted*, ___ U.S. ___, 119 S. Ct. 443 (1998); J.A. 90-91.

Thus, the News Media *Amici*'s "monitoring"

argument is merely a futile *post hoc* rationalization for a brazen commercial enterprise by CNN, with commercial objectives – satisfying the program's agenda, and obtaining ratings in the process.

Moreover, in other cases, the presence of the news media has not provided any "oversight" function or impact upon law enforcement misbehavior.

For example, in *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), *cert. denied,* 514 U.S. 1062 (1995), in which the search was directed at Mr. Ayeni's alleged participation in credit card fraud, the agents entered the apartment by force *prior* to the warrant being signed, forced Mrs. Ayeni and her child to be videotaped by the news media representatives, and broke furniture in the course of the subsequent search. The only item seized was a photograph of Mr. Ayeni's family. *Id.* at 683. In addition, the searching agents acted in contravention of the United States Attorney's prohibition on bringing news media representatives along. *United States v. Sanusi*, 813 F. Supp. 149, 161 (E.D.N.Y. 1993).[2]

Nevertheless, the tape in *Ayeni* was not broadcast, obviously because it did not yield anything incriminating with respect to the *suspect*. The evidence of law enforcement misconduct, on the other hand, apparently was

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[2] *Sanusi* was the title of the criminal case in which Mr. Ayeni was prosecuted.

not considered newsworthy, even, presumably, for its "oversight" value.

Ultimately, it has not been the news media that has exposed and/or challenged such abuses. Instead, the injured parties themselves have had to institute lawsuits, seeking redress in the courts to vindicate their rights that were trampled as a result of news media and government collusion.

B. *The News Media's Presence During Search Warrant Executions Violates the Searched Individuals' Fourth and Fifth Amendment Rights, as Well As Federal Law (18 U.S.C. §3105)*

In extolling the (as yet unrealized) benefits of media participation in search warrant execution, the News Media *Amici* argue that "[t]he mere observation and recording of a search by the news media, and subsequent public dissemination of what was observed should not – without more – constitute a violation of the Fourth Amendment." News Media *Amici* Brief at 9.

That, however, misses the most important point: that the news media's presence, when in collaboration with the government and on private property, *itself* represents an egregious violation of the Fourth Amendment as well as of federal law.

As the Second Circuit explained in *Ayeni v.*

Mottola, the unreasonableness of the news media's presence with the searching agents in the Ayeni home

> in Fourth Amendment terms [was] heightened by the fact that . . . it was calculated to inflict injury on the very value that the Fourth Amendment seeks to protect – the right to privacy. The purpose of bringing the CBS camera crew into the Ayenis' home was to permit public broadcast of their private premises and thus to magnify needlessly the impairment of their right to privacy.

35 F.3d at 686.

Here, in suggesting some "balancing" is appropriate, the News Media *Amici* completely fail to recognize that the marginal alleged First Amendment benefit, which, as noted above, has yet to materialize, pales before the Fourth Amendment violation, which eviscerates entirely the the essence of the rights it was designed to

protect.[3]

Indeed, this issue reaches the heart of the Fourth Amendment's sources, implicating the evils of "general warrants" and "writs of assistance." *See Steagald v. United States*, 451 U.S. 204, 220 (1981); *Boyd v. United States*, 116 U.S. 616, 624-25 (1886); *Buonocore v. Harris*, 65 F.3d 347, 353-55 (4th Cir. 1995); *United States v. Sanusi*, 813 F. Supp. at 157. *See also Ayeni v. Mottola*, 35 F.3d at 684-85 ('[t]he protection of privacy from encroachment by governmental officers is the '"principal" object of the [Fourth] Amendment'") *citing and quoting Soldal v. Cook County*, 506 U.S. 56, 64 (1992) (other citations omitted).

In addition, the news media's presence during the

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[3] Also, the News Media *Amici*'s citation to trial closure cases [*i.e., Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) and *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980)] is unavailing. A trial is presumptively an open and public proceeding, and closure is permitted under only the rarest of circumstances. The opposite is true for the warrant execution process, since the tradition of the Fourth Amendment, and the provisions of 18 U.S.C. §3105, make the execution of a warrant the exclusive province of law enforcement. Thus, while "balancing" First Amendment interests is appropriate in the trial context, it is not in the warrant execution arena. Therefore, the closure cases are completely inapposite here.

execution of a search warrant violates 18 U.S.C. §3105, which prohibits the presence of persons other than the law enforcement officers executing the warrants, or persons "in aid" thereof. *See Ayeni v. Mottola*, 35 F.3d at 687. *See also Berger v. Hanlon*, 129 F.3d at 511; *Buonocore v. Harris*, 65 F.3d at 357-58.[4]

Section 3105 does not provide *any* exceptions, for members of the news media or anyone else, and they are subject to its proscriptions just like every other private party. As the District Court in *Ayeni* noted, "CBS had no greater right than that of a thief to be in the home, to 'capture' the scene of the search on film and to remove the photographic record." *Ayeni v. CBS, Inc.*, 848 F. Supp. 362, 368 (E.D.N.Y. 1994).[5]

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[4] Members of the news media cannot be present "in aid of" law enforcement officers executing the warrant, as suggested by a plurality of the Fourth Circuit in *Wilson v. Layne*, 141 F.3d 111, 116 (4th Cir.) (*en banc*), *cert. granted*, ___ U.S. ___, 119 S. Ct. 443 (1998), while at the same time performing some independent "oversight" function, as the News Media *Amici* assert. In fact, the news media are not present in such circumstances for either reason, but rather to exploit the broadcast and/or publication potential of the event for commercial advantage.

[5] *Ayeni v. CBS, Inc.*, became *Ayeni v. Mottola*, on appeal after CBS settled with the Ayenis and Agent Mottola and the other law enforcement officers involved appealed the District Court's refusal to apply qualified immunity to their conduct.

Nor is there any reason to treat members of the news media any differently from other private parties, since the First Amendment is not a license to commit tortious or illegal conduct. As this Court stated in *Associated Press v. NLRB*, 301 U.S. 103, 132-33 (1937), "[t]he publisher of a newspaper has no special immunity from the application of general laws. *He has no special privilege to invade the rights and liberties of others*." (Emphasis added).

That principle has also been extended to the newsgathering function. For example, in *Galella v. Onassis*, 487 F.2d 986, 995-96 (2d Cir. 1973), the Second Circuit noted that "[c]rimes and torts committed in newsgathering are not protected[.]" Likewise, in *Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971), the Ninth Circuit pointed out that "[t]he First Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering."

Thus, the news media cannot rely upon the First Amendment to escape liability for its representatives' trespass upon the Bergers' property, and for their violation of 18 U.S.C. §3105. *See Berger v. Hanlon*, 129 F.3d at 516-17. *See also Buonocore v. Harris*, 65 F.3d at 359

("[t]o conclude otherwise [in the context of a private employer's access to searched premises] would authorize law enforcement officers to invite private individuals to engage in conduct that would constitute trespass were it not conducted under the guise of a search warrant. Neither the Fourth Amendment nor §3105 grants government agents such authority").

Nor does the pursuit of law enforcement operations provide the news media an excuse. As the Ninth Circuit elaborated in *Dietemann v. Time, Inc.*,

> [t]he First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office. *It does not become a license simply because the person subjected to the intrusion is reasonably suspected of committing a crime.*

449 F.2d at 249 (emphasis added).[6]

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[6] In *Anderson v. WROC-TV*, 109 Misc.2d 904, 441 N.Y.S.2d 220, 226 (Sup. Ct. Monroe Co. 1981), in which a homeowner sued news media outlets for trespass after they had been invited by a Humane Society

Consequently, the News Media *Amici*'s arguments fail because legitimate First Amendment interests were *not* at stake in the news media's presence during the search of the Bergers' property. In fact, considering the irreparable damage the news media can do to the rights protected by the Fourth Amendment with respect to an individual's privacy, *see, e.g., Ayeni v. Mottola,* 35 F.3d at 686, the news media should be particularly subject to the strictures of §3105. That is especially true here, since the application for the warrant failed to inform the judicial officer of the planned presence of the news media during the warrant's execution.

While Section 3105 codifies clearly established

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investigator to attend the execution of a search warrant, the Court hearkened back to the origins of the Fourth Amendment:

> [i]f the media were to succeed in compelling an uninvited and non-permitted entry into one's private home whenever it chose to do so this would be nothing less than a general warrant equivalent to the writs of assistance which were so odious to the American colonists.

Fourth Amendment principles, and provides an unassailable legislative basis for the blanket proscription against the presence of non-law enforcement personnel, the News Media *Amici* never address the statute.

Nor do they discuss the Fifth Amendment Due Process implications of news media presence during search warrant executions, and the subsequent dissemination of information and images obtained as a result. Pre-trial publicity of this type is most prejudicial, and is amplified by the news media's active and coordinated participation in law enforcement activities.[7]

Thus, the News Media *Amici* do not provide any basis for departing from traditional Fourth Amendment principles, and/or from the unequivocal terms of §3105 reflecting those standards, which establish that the presence of persons *not* assisting law enforcement in the execution of the warrant constitutes a violation of the

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[7] Additional Fifth and Sixth Amendment concerns are raised by the prospect of statements made by persons searched that are recorded by news media microphones, or of uncounseled statements made to news media representatives absent appropriate *Miranda* warnings. *See Berger v. Hanlon,* 129 F.3d at 513. Moreover, the whole doctrine of "consent" is skewered by the intimidating presence of cameras, lights, microphones, and other attendant features of news media coverage.

fundamental protections afforded by the Fourth Amendment. As a result, exceptions and/or "balancing" should not be countenanced.

C. *The News Media's Presence During Search Warrant Executions Creates A Dangerous Situation for All Persons Involved in the Search*

The News Media *Amici* would permit the presence of untrained, unarmed, and unidentified members of the news media during the execution of search warrants. That is a prescription for disaster. Equipped with cameras, lights, and microphones – provocative instruments, particularly when the home or residential property is invaded – the news media create a volatile mix that would breed chaos and confusion at precisely the worst time.

For instance, the presence of a television crew or newspaper photographer could lead the searched person to believe that it is *not* the police, but rather the news media, that has entered his or her dwelling. That surely increases the possibility of a confrontation and disobedience to instructions from law enforcement officers.

Just as surely, the glare of television lights, or the focus of a camera lens, is far more likely to incite a panic reaction and inappropriate behavior by the person being searched. Thus, the Fourth Circuit's surmise in *Wilson v. Layne*, 141 F.3d 111, 116 (4th Cir.) (*en banc*), *cert. granted*, ___ U.S. ___, 119 S. Ct. 443 (1998), that news

media presence "afford[s] protection to the officers by reducing the possibility that the target of the warrant will resist arrest in the face of recorded evidence of his actions[,]" is refuted by both logic and experience.

Indeed, the facts of the cases prove the opposite, and provide far more revealing and illustrative evidence of the frightening possibilities for catastrophe. For example, in *Ayeni v. Mottola*, the presence of the news media *caused* a physical confrontation.

In *Ayeni v. Mottola,* the suspect [Mr. Ayeni] was not at home, but his wife [Mrs. Ayeni] and child were. As the Second Circuit recounted,

> Mrs. Ayeni objected to the videotaping of herself and her son. She tried to avoid the camera by covering her face with a magazine. [The child] was crying and told his mother that he was frightened. When Mrs. Ayeni attempted to shield her son's face with a magazine, [the agent] grabbed the magazine out of her hand, threw it on the floor, and told the plaintiffs to "shut up."

35 F.3d at 683. The agents then "directed the camera crew to videotape Mrs. Ayeni's face." *Id.*

In *Wilson v. Layne,* the presence of a newspaper photographer apparently precipitated the altercation between the law enforcement officers executing the warrant and Mr. Wilson, in which Mr. Wilson reacted angrily to a congregation of officers and reporters (looking for Mr. Wilson's son) in his living room in the morning hours, and found himself on the floor with a gun pointed at his head. As Mr. Wilson testified in his deposition when asked what "about those two people [*The Washington Post* reporters] did upset you?": "[o]ne person was taking pictures of me in the nude. Well, I had on a pair of briefs. I thought that was wrong." *See* Joint Appendix in *Wilson v. Layne*, No. 98-83, at 45.

Aside from the critical safety issues, there are many other reasons why prudent law enforcement authorities would *exclude* members of the news media from warrant executions, including the fact that wide public dissemination might alert other targets of the investigation, endanger informants who provided information for the warrant application, and reveal and/or discourage cooperation at an early and advantageous stage of the proceedings. Perhaps that is why the United States Attorneys' Manual was amended May 3, 1993, less than two months after the search in this case, to deny members of the news media the right to be present at the execution of search warrants (and/or confidential pre-execution

briefings). *United States Attorneys' Manual*, at 1-7.0000, VII.D.

Thus, the Department of Justice has tacitly recognized that the presence of the news media during the execution of search warrants is the equivalent of a lighted match in the vicinity of a tinderbox.

D. *The News Media's Presence During Search Warrant Executions Creates the Self-Fulfilling Need for the Search to Yield Incriminating Evidence and a Subsequent Criminal Prosecution*

Permitting members of the news media to be present during the execution of search warrants will also have significant adverse effects on searches and their aftermath. The searches will be judged not on their merits, but on whether they justified media coverage. Thus, searches will *require* results because only then will law enforcement officials be able to justify media presence, and only then will future media interest in law enforcement operations be ensured.

This self-fulfilling aspect of news media presence corrupts not only the search, but also what actions follow. A search that is the subject of news media coverage will have to spawn a prosecution in order to appear justified.

Conversely, searches attended by the news media would be too easily prone to abuse by the news media, to

create more compelling "real-life television drama," and by individual prosecutors to advance their careers and/or other personal agendas.[8] The objective of the search would no longer be for evidence *per se*, but for something that would justify current and future media involvement and exposure. As the Second Circuit declared eloquently in *Ayeni v. Mottola,* "[a] private home is not a sound stage for law enforcement theatricals." 35 F.3d at 686.

That perversion of the purpose of the warrant runs afoul of a centuries-old requirement:

> as early as 1603, it was established in the common law that intrinsic to the validity of the specific warrant was that it had to be executed by a properly commissioned officer to

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[8] The popularity, proliferation, and profitability of "reality-based" law enforcement television programs is discussed in Elsa Y. Ransom's article "Home: No Place For 'Law Enforcement Theatricals' – the Outlawing of Police/Media Home Invasions in *Ayeni v. Mottola,*" 16 Loy.L.A.Ent.L.J. 325 (1996), *citing* David Tobenkin, "Stations Face New Reality: Syndicators Have Host of Offerings, Including Magazine, Health, Law Enforcement Entries," *Broadcasting & Cable*, January 23, 1995, at 58.

> further the *government's purpose*. Even a duly authorized officer could not execute a warrant to further the purposes of a private individual.

Buonocore v. Harris, 65 F.3d at 354 (emphasis in original) (citation omitted).

Here, too, the Ninth Circuit concluded below that "[t]his search stands out as one that at all times was intended to serve a major purpose other than law enforcement." *Berger v. Hanlon*, 129 F.3d at 510. As the Court added, CNN "wanted footage of the discovery of evidence showing that Paul Berger was poisoning eagles, and the government wanted the publicity." *Berger v. Hanlon*, 129 F.3d at 507.

The symbiosis of intent and objective here created the worst possible result. In fact, this case presents a perfect yet unfortunate manifestation of the inevitable corruption of the integrity of the search warrant execution process:

- there was a letter agreement between the government and the media that created a unity of purpose: to target and prosecute a particular person in order to promote a particular agenda;

- that common agenda resulted in a search that was "jointly planned" by the news media and law enforcement "so that the [law enforcement] officials could assist in the media obtaining material for their commercial programming," *id.*;

- in order to create that opportunity, the government relied on stale information about the Bergers;

- the government did not find the evidence it sought or expected to find; and

- the indictment did not reflect that limited yield, but instead substantially overcharged Mr. Berger.

The absence of evidence ultimately resulted in a drastic reduction of the charges that were submitted to the jury, and Mr. Berger was convicted of only a misdemeanor involving the misuse of a pesticide rather than the unlawful killing of protected wildlife. Yet the Bergers were compelled to endure worldwide opprobrium from CNN solely because of the law enforcement officials' and news media's abrogation of their Fourth Amendment rights.

The prospect of media coverage and favorable publicity also produces a powerful temptation for

aggrandizement (through either personal celebrity, professional advancement, and/or promotion of a political agenda) that is entirely at odds with a prosecutor's or law enforcement officer's public mission. Here, the record makes it clear that the agents and the news media shared a common political goal they hoped to accomplish via the search of the Bergers' property and the prosecution of Mr. Berger. *See* Joint Appendix at 63-64 (Complaint at ¶ 83).

Moreover, as the Ninth Circuit pointed out below,

> the record in this case suggests that the government officers planned and executed the search in a manner designed to enhance its entertainment value, by engaging in, for example, conversations with Mr. Berger for the purpose of providing interesting soundbites, and to portray themselves as tough, yet caring investigators, rather than to further their investigation.

129 F.3d at 515.

Absent the media focus that enhanced the importance of the search, and the need to recover evidence, it is it respectfully submitted that the Bergers' property would likely not have been searched, and almost surely Mr. Berger would not have been prosecuted. Nevertheless, the media's involvement arguably was responsible for both the search and the prosecution. It is that corruption of the criminal justice system, of the prosecutorial function, and of the protections guaranteed by the Fourth Amendment, that must be prevented.

E. *This Court, and Several Statutes, Establish That Certain Aspects of a Criminal Investigation Are Not Subject to Any "Public Right to Know," and the Warrant Execution Falls Squarely Within That Secret and Confidential Framework*

The News Media *Amici* rely on the public's "right to know" as a basis to invade a person's home and property in the company of law enforcement executing a search warrant. However, there is ample precedent for circumscribing any "right to know" in the context of criminal investigations and proceedings.

For instance, in the grand jury context, Rule 6(e), Fed.R.Crim.P., mandates secrecy of grand jury proceedings. Certainly, allowing a reporter into the grand jury cannot be justified based on any "right to know." Moreover, this Court has indicated that the legislature may properly prevent even a witness before the grand jury from

revealing the content of his or her testimony during the pendency of the grand jury investigation. *See Butterworth v. Smith*, 494 U.S. 624, 632 (1990).[9]

Similarly, 18 U.S.C. §2518(8)(b), provides that wiretap recordings shall be promptly sealed, and disclosed only pursuant to court order. It cannot be argued by the News Media *Amici* that it has the right to such recordings merely upon the invitation of law enforcement authorities. *See also United States v. Aguilar*, 515 U.S. 593, 605-05 (1995) (upholding validity of18 U.S.C. §2232(c), which prohibits the disclosure of any wiretap interception even

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[9] The defining difference between cases in which this Court has refused to apply such non-disclosure statutes and this case is that in the other cases the information was derived *independent* of the law enforcement function (through either diligent research or investigation and/or unauthorized leaks from official sources), while here the news media's access to the information was *dependent* on its action in conjunction with, and with the formal approval of, law enforcement. *See, e.g., Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 99 (1979); *Cox Broadcasting v. Cohn*, 420 U.S. 469, 495 (1975) ("States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection").

after the wiretap may have expired).[10]

Section 3105, discussed **ante**, at 12-13, establishes the importance of secrecy and exclusivity of access in the warrant context, and in so doing is entirely consistent not only with the sections cited above, but also with the purposes of the Fourth Amendment.

Thus, it is commonplace for a criminal investigation to proceed free of scrutiny from the news media, and for disclosure to be controlled by the courts rather than agents or prosecutors. Such secrecy insulates the investigation from premature and inappropriate disclosures, and protects a suspect from negative and prejudicial publicity in the event (a) the investigation does not produce a prosecution; or (b) an indictment and/or trial ensues.

There is no reason to disturb this operation of the criminal justice system, and the News Media *Amici* have not advanced any rationale that could justify jeopardizing the balance achieved between legitimate law enforcement objectives and a prospective defendant's rights.

As the District Court noted in *United States v.*

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[10] In the civil context, this Court has held that a newspaper could be barred by a protective order from publishing information it acquired via discovery. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 31 (1984).

Sanusi, "the First Amendment is a shield, not a sword." 813 F. Supp. at 160. Thus, "[e]ven a reporter must accept limits on how far upon another person's privacy he or she may intrude." *Id.*

Here, the News Media *Amici* seek to abolish such necessary limits, and to use the First Amendment as a sword that cuts a broad and mortal swath across the Fourth Amendment, the integrity of the warrant execution process in particular, and the entire criminal justice system in general. It is respectfully submitted that such a result cannot be permitted.

CONCLUSION

Accordingly, for the reasons set forth above, as well as for those set forth in Respondents' Brief, it is respectfully submitted that the decision of the United States Court of Appeals for the Ninth Circuit should be affirmed in all respects.

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Respectfully submitted,

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